

4 Official Opinions of the Compliance Board 38 (2004)

CLOSED SESSION PROCEDURES – WRITTEN STATEMENT – TOPIC TO BE DISCUSSED MUST BE INCLUDED – EXCEPTIONS PERMITTING CLOSED SESSIONS – PERSONNEL – DISCUSSION OF COMPENSATION FOR FIVE INDIVIDUALS, RELATED TO SPECIFIC FACTS ABOUT EACH INDIVIDUAL, HELD TO FALL WITHIN THE EXCEPTION – MINUTES – CLOSED SESSION STATEMENT – STATEMENT MUST INCLUDE DESCRIPTION OF ANY ACTION TAKEN DURING CLOSED SESSION

March 16, 2004

*Tom Marquardt, Executive Editor
Capital-Gazette Newspapers*

The Open Meetings Compliance Board has considered your complaint that the Anne Arundel County Board of Education (“County Board”) violated the Open Meetings Act on December 3, 2003. Specifically, the complaint alleged that the County Board failed to conduct a recorded vote before meeting in closed session as required under the Act. Furthermore, the complaint alleged that a matter considered during the course of the closed session, a salary increase for a group of employees, was inappropriately considered as the kind of specific personnel matter that justifies a closed session under the Act.

For the reasons explained below, we conclude that the Board did not violate the Act as suggested in the complaint. However, we note that documentation prepared in connection with the closed session failed to satisfy the procedural mandates of the Act.

I

Complaint and Response

According to the complaint, on December 3, 2003, during the course of a closed session conducted prior to the County Board’s public meeting, the County Board discussed and voted on salary increases for the school system’s senior staff and approximately 238 other administrative employees. Neither the discussion nor the result of the vote was reported during the public meeting that followed. The complaint challenged the propriety of the closed session on two grounds. First, it alleged that the County Board failed to conduct a vote before meeting in closed

session as required under the Open Meetings Act. §10-508(d)(2)(i).¹ Second, it alleged that consideration of salary increases for a significant number of employees was not a permissible justification for a closed meeting under the “personnel” exception of the Act. §10-508(a)(1). The complaint stated: “Although the Open Meetings Act permits closed meetings to address compensation issues as they relate to personnel matters, the exception is not meant to apply to votes and discussions on salary increases for a *group* of employees. As we understand the discussion, it alternated between salary issues as they applied to specific individuals and as they applied to a group of individuals” (emphasis in original).

In a timely response on behalf of the County Board, its counsel, P. Tyson Bennett, denied the allegations raised in the complaint. As to the procedural allegation, the County Board noted that a vote was conducted prior to start of the closed session. As evidence of the vote, the County Board included with its response a copy of the written statement recorded under §10-508(d)(2). The statement was a pre-printed form on which three justifications and the corresponding statutory authority for the closed session were checked: “to discuss personnel matters,” §10-508(a)(1); “to consult with counsel to obtain legal advice” §10-508(a)(7); and “to discuss negotiations” §10-508(a)(9). The form identified six members of the County Board voting in favor of a motion to meet in closed session and two members of the County Board absent at the time of the vote. The County Board also included a copy of the minutes of the County Board’s December 17, 2003 meeting, in which it documented the justification and vote of the closed session held December 3, 2003.²

As to the substance of the discussion, the County Board disputed the complaint’s description of the matter considered during the closed session. The response noted, by way of background, that the issue of a cost-of-living-adjustment (“COLA”) for school system employees had been a matter of public knowledge for some time.³ To fund a 1% mid-year COLA, the County Board was scheduled to consider a request to the County governing body for a supplemental appropriation, authorizing the use of available but unappropriated funds, at its public meeting on

¹ Except as otherwise specified, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5, of the State Government Article, Annotated Code of Maryland.

² As reflected in the December 3 agenda, the County Board viewed the closed session as a segment of the entire meeting held that day. Thus, the reporting of the closed session in the minutes of the following open session appear in the County Board’s minutes of December 17. The response acknowledged that the reference in the minutes to a 7-0 vote was inaccurate. Apparently, the actual vote was as reflected on the statement prepared prior to the closed session, December 3.

³ The County Board included with its response a copy of a relevant news article from *The Capital Online* that was published October 30, 2003.

December 3. According to the County Board, the discussion during the closed session did not deal with a sizable group of employees as suggested in the complaint. Rather, the discussion addressed whether the COLA would extend to five specific senior staff members who had received pay increases during the prior year as a result of an administrative reorganization or job reclassification. The County Board discussed these employees' individual situations, and a decision was made that these five individuals would not benefit from the across-the-board adjustment. The County Board's response included affidavits of the County Board President, Superintendent of Schools, and the Counsel to the County Board attesting to the scope of discussion.

II

Analysis of Complaint

A. Required Vote

The documentation submitted by the County Board along with its response clearly demonstrates that the County Board did not meet in a closed session without first taking a vote as required under §10-508(d)(2)(i). Thus, we find that the County Board did not commit the procedural violation suggested in the complaint.

B. Basis for Closed Session

The complaint suggested that the County Board inappropriately relied on the personnel exception when it met in closed session to discuss salary adjustments for a class of individuals. As noted above, the complaint suggested that discussion concerned "senior staff and about 238 other administrative employees." The County Board indicated that discussion was limited to five named individuals.

Authority to close a meeting under the personnel exception is phrased in terms of certain employment actions affecting "appointees, employees, or officials over whom [the public body] has jurisdiction" or "any other personnel matter that affects 1 or more specific individuals." §10-508(a)(1). We have repeatedly held that the personnel exception extends only to discussions of specifically identifiable individuals. It does not extend to policy deliberations pertaining to an entire class. *See, e.g.,* Compliance Board Opinion 03-17 (August 20, 2003), slip op. at 3-4 (discussion of compensation adjustment for class of employees under personnel exception violates Act). Nonetheless, a public body may close a meeting under the personnel exception to consider a matter affecting several individuals, as long as the focus of deliberations is on facts about, or attributes of, these specific, identifiable individuals. This is true even though, following its deliberations, the public body decides to collectively address all of the individuals through a single action.

The obvious purpose of the personnel exception is to allow a public body to keep confidential deliberations that involve the personal details of particular public employees, about which they have a legitimate expectation of privacy. *See* §10-616(i) of the State Government Article (Public Information Act generally prohibits disclosure of “a personnel record of an individual”). Therefore, even if a number of employees are the subject of discussion, §10-508(a)(1) applies if the public body’s deliberations focus on the specific characteristics of identifiable individuals rather than decision making about a generic class.

According to the evidence provided with the response, the County Board’s closed session on December 3 centered on five specifically identified employees. Discussions included salary adjustments that these individuals had received during the past year as well as changes in their individual job responsibilities. Following its discussions, the County Board determined that the COLA would not extend to these five employees. Because of the nature of the deliberations, the County Board appropriately relied on the personnel exception in conducting the closed session on December 3.

III

Procedural Deficiencies

Under the complaint process prescribed in the Open Meetings Act, we generally limit our discussion to matters raised in the complaint. §10-502.5(b)(2) and (d)(2); Compliance Board Opinion 03-8 (June 9, 2003), slip op. at 3. However, we would be remiss if we failed to point out two patent procedural deficiencies in the materials submitted by the County Board.

Prior to a public body’s meeting in closed session, the presiding officer is required not only to conduct a recorded vote but also to complete “a written statement of the reason for closing the meeting, including a citation of the authority under [§10-508], and a listing of the topics to be discussed.” §10-508(d)(2)(ii).⁴ Furthermore, the minutes of next open session must reflect, among other things, “a citation of the authority under [the Act] for closing the session” and “a listing of the topics of discussion, persons present, and each action taken during the session.” §10-509(c)(2)(iii)-(iv). Although neither document is expected to include a level of detail that would defeat the desired confidentiality underlying the closed session, we have repeatedly noted that the mere parroting of the applicable exception is not

⁴ To assist public bodies in complying with the Act, the Attorney General has developed a model form that lists the applicable exceptions allowing for a closed meeting and includes space in which to note the topics to be discussed and to describe the reason for closing the session. *See* Office of the Maryland Attorney General, *Open Meetings Act Manual* App. C (4th ed. Sept. 2000).

acceptable. Compliance Board Opinion 03-4 (March 13, 2003), slip op. at 8; *see also* Compliance Board Opinion 98-5 (June 18, 1998), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 18, 19-20.

Neither the statement recorded at the County Board's December 3 session nor the minutes of the following open meeting, December 17, satisfied the statutory requirements, because neither document provided any description of the topics considered beyond generally paraphrasing the exceptions available under the Act. Furthermore, the summary of the closed session included in the December 17 minutes failed to indicate what action, if any, was taken during the course of the closed session. Thus, we recommend that the County Board review its practices in these areas.⁵

IV

Conclusion

We find that the County Board did not violate the Open Meetings Act when it met in closed session under the personnel exception to consider the application of an across-the-board COLA to specifically identified employees. Furthermore, we find that the County Board did conduct a vote prior to meeting in closed session. However, in reviewing the record, we have noted deficiencies in the manner in which the County Board documented the closed session.

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⁵ It is not clear from the record before us whether discussions during the December 3 closed session extended beyond the implementation of the COLA for specified employees. As noted above, the written statement submitted by the County Board identified two additional reasons for the closed session: to consult with counsel to obtain legal advice and to discuss negotiations. We note that invoking additional exceptions absent a bona fide justification would constitute a violation of the Act. *See* Compliance Board Opinion 03-19 (August 20, 2003), slip op. at 4-5.